ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer Information	)	

REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION

LCI International Telecom Corp. ("LCI"),[1] by its attorneys, respectfully replies to the comments and oppositions regarding its petition for reconsideration of the *Second Report and Order* in the above-captioned docket.[2]

I. THE COMPUTER SYSTEM MODIFICATIONS REQUIRED BY SECTIONS 64.2009(A) AND (C) OF THE RULES SHOULD BE ELIMINATED

The reconsideration petitions and nearly all commenters agreed with LCI that the Commission's "flagging" and "electronic audit" safeguards exceed Section 222's purposes.[3] Carriers representing all industry segments agreed that these safeguards are complex and

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1 LCI is a wholly-owned subsidiary of Qwest Communications Corporation.

2 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115 (rel. Feb. 26, 1998) ("*Second Report and Order*").

3 47 C.F.R. §§ 64.2009(a) and (c).

extremely costly to implement.[4] Moreover, the additional benefits of these safeguards are miniscule at best.[5] Accordingly, the Commission should promptly eliminate the requirements that carriers "flag" CPNI on the first screen and implement "electronic audit" systems to track CPNI access.

LCI disagrees with MCI's argument that the flagging requirement should be retained.[6] MCI contends that the electronic audit requirement imposes an "overwhelmingly disproportionate burden," while the flagging requirement is more like training and supervisory review in terms of its compliance burdens. In LCI's case, however, both the flagging requirement and the electronic audit requirement impose significant burdens on LCI. Like Cable & Wireless and several other carriers, LCI has multiple systems that would need to be modified to "flag" CPNI consents.[7] Moreover, LCI's systems allow user access at a number of points, presenting multiple "first screens" at which a CPNI flag would be required. Compliance with the flagging requirement would be a significant undertaking for LCI, not the minimal obligation MCI's argument suggests.

Further, LCI agrees with Sprint that the problem is not solved by limiting the flagging and electronic audit requirements to systems used for marketing or sales.[8] LCI's systems are not neatly divided along the lines that such a requirement presumes. As a result, there is no such thing as a "marketing" or a "sales" system. Instead, LCI's systems are designed around functional or informational requirements, and employees have access to all of these

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4 *See, e.g.,* Airtouch Comments at 5-6; Frontier Comments at 2-3; Sprint Comments at 8-9; AT&T Petition at 10-11, 14.

5 Frontier Comments at 3.

6 MCI Comments at 51.

7 Cable & Wireless Comments at 8; BellSouth Comments at 10; AT&T Comments at 17.

8 Sprint Comments at 8; *see also* AT&T Comments at 15.

systems on an as-needed basis. For example, call traffic systems may be accessed by customer service representatives, sales representatives or regulatory personnel, not just by its network management personnel, depending upon the nature of the question that needs to be answered. Therefore, even if the requirements were limited to "marketing" uses, LCI would have to make significant modifications to nearly every one of its systems, or alternatively, would have to deny its sales personnel access to certain systems entirely. Neither alternative promotes the public interest.

LCI does not support elimination of all of the safeguards in Section 64.2009, however. As several commenters noted, the training, supervisory review and corporate certification requirements reasonably promote compliance with the CPNI restrictions.[9] These requirements appropriately give carriers the flexibility to determine how best to ensure compliance in the context of their systems and procedures.[10] Moreover, these requirements also will provide the Commission with a basis for evaluating claims of violations of the rules. If a customer (or carrier) alleges an improper use of CPNI, the training and sales procedures provide an important starting point for determining whether a violation occurred. Accordingly, the Commission's enforcement objectives can be adequately promoted by retaining Sections 64.2009(b), (d) and (e) of the Rules.[11]

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9 *See, e.g.,* Frontier Comments at 3; AT&T Comments at 16; Cable & Wireless Comments at 9.

10 *See* LCI Petition at 6.

11 LCI believes that Frontier's suggestion of carrier-initiated audits is unnecessary. Frontier Comments at 3. However, there is nothing that would prevent the FCC's Enforcement Division from conducting one or more random audits of carriers' compliance with Section 222.

II. THE COMMISSION SHOULD NOT ALLOW CARRIERS TO RELY ON CPNI APPROVALS OBTAINED UNDER COMPUTER III, BUT SHOULD "GRANDFATHER" AFFIRMATIVE, WRITTEN APPROVALS OBTAINED IN GOOD FAITH ATTEMPTS TO IMPLEMENT SECTION 222

In its Petition, LCI demonstrated that the *Computer III* CPNI approval process significantly differed from Section 222's requirements. Accordingly, LCI argued that the Commission should reverse the Common Carrier Bureau's decision to allow the BOCs to rely on some *Computer III* authorizations in future uses of CPNI.[12] Only Ameritech responded to these arguments. Ameritech failed to show, however, that the *Computer III* approval process produced the informed consent necessary to satisfy Section 222's approval requirement.

In fact, its response essentially admits that consent was solicited in a high-pressure environment that would violate the Section 222 CPNI rules. Acknowledging that the BOCs frequently threatened customers with negative consequences if they withheld approval under the *Computer III* rules, Ameritech claims without support that this "did not amount to . . . improper pressure to grant consent."[13] However, the new rules clearly prohibit the Hobson's choice many BOCs forced customers to make.[14] And with good reason. Consent obtained under the threat of negative consequences is neither truly voluntary nor informed. As a result of the environment in which *Computer III* approvals were solicited, one cannot tell how many customers granted consent solely or partially in order to retain their existing customer support team – a choice they would *not* have to make under Section 222. Approvals received under the

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12 LCI Petition at 16-18.

13 Ameritech Comments at 13.

14 *See* 47 C.F.R. § 64.2007(f)(2)(iii).

Computer III rules lack a central premise of the new rules, and therefore do not translate to the Section 222 environment.[15]

Several carriers argue that CPNI approvals obtained *after* Section 222 became effective should be deemed valid, even if they did not contain all of the disclosures required by Section 64.2007 of the Rules.[16] LCI agrees that, in some circumstances, carriers should not be required to repeat approvals they have already obtained in good faith compliance with the language of Section 222. Approval should be deemed sufficient to satisfy the new rules if (1) the solicitation clearly requested approval to use CPNI for marketing purposes, (2) affirmative, written approval was obtained, and (3) the carrier did not suggest or imply that a customer's service relationship would change or that denial of approval would impair the provision of any services to which the customer subscribes. If these three elements are present, then the Commission can be assured that any approval obtained was both informed and voluntary. LCI agrees, however, that any carrier seeking to rely on such prior approval should be required to send these customers a notice containing the disclosures required by Section 64.2007 and instructing the customer how it may modify or revoke the approval previously granted.[17]

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15 In addition, Ameritech does not refute LCI's showing that the context under which approval was solicited was different in other respects as well. Not only are competitive market conditions radically changed, but the BOCs' *Computer III* solicitations did not require a full disclosure of the customer's CPNI rights (rights which were different than a customer's rights under Section 222), a statement that federal law imposes a duty to protect the confidentiality of this information, or that the solicitation be proximate to the notification that was provided. *See* LCI Petition at 18.

16 AT&T Petition at 19-21; Sprint Comments at 9-10; Cable 7 Wireless Comments at 6.

17 *See* AT&T Petition at 21. ("AT&T would send customers who had given approval ... a full written notice of their rights, including an explanation that they have a right to withdraw their approval should they wish to do so").

III. CPNI PROTECTION SHOULD BE TAILORED TO REFLECT THE DIFFERENT COMPETITIVE IMPLICATIONS OF CPNI USE AMONG CARRIERS

The comments do little to refute the fact that CPNI in the possession of incumbent LECs is both far more valuable and far more likely to be used for anticompetitive purposes. Instead, arguing against a straw man, several BOCs complain that LCI seeks to "carve up" Section 222 and interpret its language differently depending upon the type of carrier using CPNI.[18] These arguments misconstrue LCI's position. LCI agrees that Section 222 applies to "every telecommunications carrier" and thus that Section 222's restrictions on the use of CPNI apply equally to all carriers.

However, the point the BOCs miss is that the Commission is not handcuffed by Section 222 in dealing with additional or different competitive concerns raised by the ILECs' possession of CPNI. LCI does not believe that Section 222's obligations are exclusive or that they represent the ceiling on the FCC's ability to regulate to protect against the anticompetitive use of customer information. Where competitive considerations differ – as they do in the case of the largest incumbents' access to CPNI – tailoring of the rules is necessary and appropriate.

The Commission has authority to tailor its rules through two alternative means. First, as LCI argues in its Petition, the Commission always has possessed the power to regulate customer information (including CPNI) outside of Section 222. Thus, the Commission is free to add requirements necessary to address concerns unique to one class of carriers or unique to a particular context. This is essentially what the Commission had always done in the case of the BOCs, GTE and AT&T. Alternatively, the FCC can forbear from applying portions of Section

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[18] BellSouth Comments at 14; Bell Atlantic Comments at 3; Ameritech Comments at 7.

222 where the criteria for forbearance are met. Several petitioners suggested this approach,[19] and a number of commenters, including U S West acknowledge that the FCC has this option.[20] Thus, if Section 222 mandates restrictions on CPNI use that are not necessary in the case of certain carriers, the Commission may adjust its rules as necessary.

Even the *Second Report and Order* acknowledges that ILEC CPNI presents greater competitive concerns than other carriers' CPNI. Many commenters agree with this assessment.[21] The BOCs make no serious attempt to contest the point. Moreover, because customers were forced to use ILECs while they were a franchised monopoly, the fundamental underpinning of the FCC's implied consent theory is missing. The ILECs received vast amounts of CPNI under circumstances that could hardly be called voluntary.[22] Accordingly, some tailoring to address these concerns is necessary.

A good example of the need for tailoring of the rules is an ILECs' use of CPNI to "retain" a customer about to leave its local service. For the foreseeable future, ILECs serve an essential "gatekeeper" function in local services. The ILECs currently have practically 100 percent of the local customers and they typically must process UNE or resale orders for each customer that leaves the ILECs' retail service. Moreover, the ILEC controls the timing of the switch from the ILEC to the competitor's local service. An ILEC should not be able to leverage this position to thwart a competitor's ability to serve its new customer. Thus, regardless of

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19 *See, e.g.*, CTIA Petition at 34; GTE Petition at 2-6.

20 US West Comments at 18 n.41.

21 WorldCom Comments at 2; AT&T Comments at 19.

22 U S West's claim (comments at 19) that it has "long standing relationships" and developed a "special trust" with customers must, therefore, be taken with a grain of salt.

whether other carriers are subject to a restriction on the use of CPNI in analogous situations, an ILEC should not be permitted to use CPNI (including information obtained through the local service order entry process) to "retain" customers that are attempting to leave the ILEC's local service. Put simply, putting aside any customer privacy considerations embodied in Section 222, the goal of promoting local competition compels the Commission to prohibit ILECs from using CPNI in this manner. For similar reasons, LCI urges the Commission to adopt the additional safeguards described in LCI's Petition for Reconsideration.[23]

IV. CONCLUSION

For the foregoing reasons, the Commission should reconsider its rules issued in the *Second Report Order* and make modifications consistent with the proposals outlined in LCI's petition for reconsideration.

Respectfully submitted,

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[23] LCI Petition at 13-15.